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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1932. No. 40.

BERNARD L. SHAPIRO,
Petitioner,

vs.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the above named Horace B. Wilgus and David Bachman, Receivers of Miller Robinson Company, and present this, their petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show:

1. That this Court in its opinion herein erroneously found, from the record and the statements of counsel, that Herbert P. Robinson was unable to pay his debts as they matured, but believed he would be able to pay them in full if his creditors were lenient, and looked for a surplus of

$100,000, if the business went on under the fostering care of a receiver; that, pressed by creditors, he cast about for a device whereby his business might go on and the importunate be held at bay; that he had to reckon with obstructions erected by a local law, which does not permit the appointment of a receiver for a business conducted by an individual; and that his act responded to the need, when he incorporated his business. On the contrary, the record shows that the purpose of Robinson in the formation of the corporation was to continue in corporate form the business in which he had been theretofore engaged as an individual (R. pp. 17, 18). No statement by counsel at the bar of this Court, or elsewhere, was intended to convey the impression that the said Herbert P. Robinson incorporated his business for the purpose attributed to him by this Court, and the existence of such a purpose is not a fact appearing in the record, nor is it an actual fact.

2. That this Court in its opinion herein erroneously declared that "The conveyance and the receivership are fraudulent in law as against non-assenting creditors. They have the unity of a common plan, each stage of the transaction drawing color and significance from the quality of the other; but, for convenience, they will be considered in order of time as if they stood apart. The sole purpose of the conveyance was to divest the debtor of his title and put it in such form and place that levies would be averted. The petition to issue execution and the answer by the receivers leave the purpose hardly doubtful. Whatever fragment of doubt might otherwise be left is dispelled by the admissions of counsel on the argument before us."

The petition to issue execution was the pleading of a hostile party. The answer of the receivers averred that the corporation was formed to continue in corporate form the business in which Robinson had theretofore engaged as an individual.

The conveyance was identical in substance with the transfer in Love v. Clayton, et al., 287 Pa. 205, 215, decided after the enactment of the Uniform Fraudulent Conveyance Act in Pennsylvania, and sustaining the validity of a transfer of business property, contemplating a continuance of the business, and setting up a scheme whereby all creditors would be paid. In the federal courts the construction placed upon the local statute by the highest court of the state is controlling: Sumner et als. v. Hicks et als., 2 Black 532, 533, 534; Peter v. Bain, 133 U. S. 670, 686.

The formation of the corporation and the conveyance to it occurred on the same day (R. pp. 12, 17, 18), but the application for a receiver was not made until three days later, (R. p. 2) and this makes against a finding that the conveyance and the receivership had the unity of a common plan.

By the record, it appears that the corporation was formed to receive a transfer of the property and to continue the business; that this became impossible because a suit thereafter was commenced against it and others were threatened; and that the receivership resulted from these circumstances. Robinson, as an individual, could have obtained a result in the Federal Court under the Bankrupcty Act, which would have been less favorable to his creditors, including the petitioner herein. He could have filed a voluntary petition in bankruptcy, although solvent, (11 USCA, § 22, clause a); the bankruptcy court could have authorized his business to be conducted for a limited period by a receiver, (11 USCA, § 11, clause 5); and his discharge in bankruptcy would have absolved him from further liability to his creditors (11 USCA, § 35). In the receivership proceeding under the general equity jurisdiction in this case, if sufficient funds were not realized to pay the creditors in full, Robinson would still be liable to them for the deficiency. He did not seek to escape from his creditors, and his joining in a bill in equity for a re-

ceiver should not be adjudged part of a fraudulent scheme to hinder, delay, or defraud his creditors, when he could have put them in a much less favorable position by filing a voluntary petition in bankruptcy under the Act of Congress.

3. That this Court in its opinion herein erroneously found that the end and aim of the receivership in this case was not to administer the assets of a corporation legitimately conceived for a normal business purpose and functioning or designed to function according to normal business methods, but that what was in view was very different, to wit, a corporation formed three days before the suit for the very purpose of being sued was to be interposed between its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers. That this Court in its opinion herein erroneously found that, while it is proper for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large, such was not the case here, because it is another thing for a debtor, co-operating with friendly creditors, to bring the corporation into being with the hindrance and delay of suitors the very aim of its existence. This Court in its opinion herein erroneously found that the conveyance to the corporation was part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design.

The Court found that the suit really and substantially involved a dispute or controversy properly within the jurisdiction of the district court; that the corporation was not improperly or collusively made for the purpose of creating a case cognizable by the district court; and that dismissal of the suit was not required under Section 37 of the Judicial Code, (28 USCA, § 80). The transfer of the property

to the corporation was actual, the debts chargeable against the property were real, and the motives which induced the creation of the corporation and the transfer of the property to it have no influence on the validity of the transactions which are the subject of the suit: Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 524, 525.

There is no suggestion in the record that the complainant, McLean, had anything to do with the creation of the corporation or the transfer of the property to it. The district court had jurisdiction of his cause of action (The Pusey & Jones Co. v. Hannsen, 261 U. S. 491, 500), and it was proper for him, with a claim against the corporation that was legitimately his debtor, to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. The determination of this Court in this case not only jeopardizes the position of McLean, but enables one creditor to secure a preference over all of the other creditors, after the jurisdiction of the court attached for the common benefit of all creditors.

4. That this Court erroneously determined the present case for the reason that its adjudication makes a discrimination, which will be detrimental to the interests of business men of the country without just cause, in the following particulars, among others that might be mentioned:

(1) A solvent debtor, with frozen assets, will be unable to prevent bankruptcy, which some regard as akin to disgrace, if any one of his creditors becomes antagonistic.

(2) One creditor of a debtor can block the efforts of the balance of creditors to conserve the debtor's assets for the common benefit of all by a receivership in equity and, at the same time retain the debtor's liability for any deficiency after distribution of the funds realized from administration of his business and sale of his assets.

(3) If A is doing business as an individual and B is doing business as a corporation, B will have a remedy in a court of equity, with its attendant advantages, that will not be available to A because of a legal technicality, which A cannot avoid through a legal change of status made in good faith.

(4) Every receivership by consent will be subject to disruption on the ground that it was instituted for the purpose of hindering and delaying creditors fraudulently, notwithstanding the highest good faith is exercised by the debtor and by the creditors participating therein, and petitioning creditors, and the receiver, will be subject to liability to any non-assenting creditor, although wholly innocent of any intent to hinder or delay any creditor in a fraudulent manner.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals for the Third Circuit be, upon further consideration, affirmed.

Respectfully submitted,

SIDNEY E. SMITH,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Sidney E. Smith, counsel for the petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

SIDNEY E. SMITH,
Counsel for Petitioners.

BRIEF OF ARGUMENT.

I.

The opinion filed by Justice CARDOZA in this case refers to no facts appearing from the record which contradict the two facts therein appearing and which, in the absence of anything else, should control the decision. These facts are that the primary purpose of the formation of this corporation was to carry on in corporate form the business which Robinson had theretofore carried on; and, that when Robinson formed the corporation, he was solvent to an ample degree. This being so, it is believed that the other findings of fact made by the Court in its opinion must be founded on what the Court has termed "admissions of counsel". If the latter is a fact, the cause has been erroneously determined through the fault of counsel and by reason of some misleading or misinforming statements made by him during the argument. Counsel is, of course, without doubt that whatever statements he made justified the inferences and conclusions drawn by the Court, as such statements were understood by the Court. He feels it incumbent upon him, however, to state to the Court that within a few minutes after resumption of argument of this case, subsequent to the luncheon recess, he became ill and although he continued and finished the argument, he has no clear recollection of making statements such as apparently were made by him. He does say to the Court that whatever was the language he used which carried to the Court the impressions as set forth in the opinion, such language was inadvertent or was in such form as to give the Court a totally incorrect result of what was intended to be said, or was in such form that it was misunderstood by the Court. Any language used by him was not intended to be, or to be construed as, an admission that (a) Robinson's actions were the result of a desire to find a device whereby his business might go on

and the importunate be held at bay; (b) that the sole purpose of the conveyance was to divest Robinson of his title and put it in such form and place that levies would be averted; (c) that the conveyance to the corporation was a part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design; (d) that the corporation was created for the very purpose of being sued; (e) that the corporation was brought into being by co-operation with friendly creditors for the purpose of delaying other creditors; (f) that the purpose and reason of the receivership was not to administer the assets of a corporation legitimately conceived but was to hinder and delay creditors. If counsel made such a statement it was contrary to the actual facts.

The actual and full facts of this transaction are not of record. The petitioner chose in the origin of the proceedings to have the question raised by him passed upon by the court below under the condition of the record as it existed upon the filing of the petition and of the answer of the receivers. The actual fact of the situation and the intent of counsel at the argument was to so state (although he appears to have been unfortunate in the use of words), that the primary purpose of the formation of the corporation was to continue in corporate form the business of Robinson and that the desire of practically everybody concerned was to avoid receivership or other adverse proceedings. This could have been demonstrated, and can be demonstrated, by the testimony of the great majority of creditors existing at the time, including not only merchandise but bank creditors in the City of Philadelphia.

It is fully realized that the foregoing statement at this time, with its effect of contradicting or withdrawing such language as may have been used at the oral argument, and upon which the Court based its findings of facts, is readily susceptible to the view that it is an afterthought

or is because of a dishonest desire to avoid the consequences of an act.

This Court does not decide cases by conjecture or by reason of suspicion, and it is felt that the only manner in which the Court could have reached its conclusions was some misleading or misinforming statement by counsel and it is felt therefore that it is the duty of counsel to lay the matter before the Court. Not the least of the reasons for this is that by the form of the decree the petitioner is relieved from establishing the facts by reason of which he asked permission to go before a jury, and it also deprives the respondents of an opportunity to show the actually existing conditions in the case.

II.

Aside from the foregoing, it is submitted, with the utmost respect, that the Court in its opinion went beyond the issues which were before it on the pleadings, and that the order made is erroneous. The decree of the Court is much wider in its scope than the prayer of the petition. The petitioner did not raise the question of the validity of the receivership as an entirety. Such question does not appear among the specifications of error. The petitioner was apparently of the opinion that the proceeding as an entirety was proper and expressly disclaimed any desire to test the validity thereof (Petitioner's Brief p. 16). He sought only to have a decree entered which would permit him to have a jury pass on his right to recover from the assets in the hands of the receivers the amount due him on the judgment he had obtained against Robinson individually. The entire argument of the petitioner was based on the ground that Robinson had committed a fraud as to the petitioner alone by the conveyance of the assets and that the receivership, while not a part of the primary fraudulent act, was a device adopted by Robinson to prevent attack on the fraud which petitioner claimed Robinson had

practiced as against him. The brief on behalf of respondents was directed entirely to this point. It has been, therefore, considered proper to raise this question in the petition for rehearing and to discuss it in this brief.

In the discussion, it will be assumed that the facts were as the Court has found them. The Court will, of course, not construe this assumption as a withdrawal of the statements made in the first part of this brief as to the actual facts.

Proceeding on this line, it is respectfully submitted that the Court was in error in reaching its conclusion that the formation of the corporation and the conveyance of the assets to the corporation were fraudulent in law and that the receivership should also be condemned as fraudulent.

The Court has found that there was not *intentional* fraud present. Its decree is based on the ruling that the conveyance and the receivership were fraudulent in law because they had a unity of plan to further a purpose to divest the debtor of his title so that levies could be averted. This is held to be contrary to the statute of Elizabeth and the Uniform Fraudulent Conveyance Act of the State of Pennsylvania; that as a consequence the conveyance to the corporation was voidable and that therefore the receivership must share the same fate.

(a)

THE CONVEYANCE BY ROBINSON WAS NOT FRAUDULENT UNDER THE LAWS OF THE STATE OF PENNSYLVANIA.

It is admitted by the petitioner that at the time the conveyance was made, and afterward, Robinson was amply solvent. Therefore, the only section under which this transaction could come is Section 7 of the Uniform Fraudulent Conveyance Act of the State of Pennsylvania (Act

of May 21, 1921, No. 379, P. L. 1045-1047; 39 PS Section 357), referred to by the Court, and the statute of 13th Elizabeth.

Section 7 of the Uniform Fraudulent Conveyance Act provides:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

In Love v. Clayton et al., 287 Pa. 205, 215, a committee of creditors of a corporation which was in financial trouble entered into an agreement with the company by which the committee secured the control of the corporation and its assets through stock transfers. This was done for the purpose of continuing its business or disposing of its property for the benefit of creditors. It was held that the agreement was in effect an assignment for the benefit of creditors and therefore valid. Mr. Justice KEPHART said, inter alia:

> ". . .courts will seize any opportunity to strike down such a transaction where fraud is intended, as a violation of the statute. There must be an intent to delay, hinder and defraud creditors. In the present case, take the entire series of transactions. It was not a transfer to pay those who signed, but it set up a scheme whereby 'all' creditors would be paid."

In York County Bank v. Carter, 38 Pa. 446, 454, partners, heavily indebted, transferred their entire property to another person in consideration of the satisfaction of his claim against them and his agreement to pay the balance of the purchase money in discharge of other partnership debts. It was held that the transaction was not void be-

cause certain creditors were preferred, no intent to hinder, delay or defraud the others appearing. Mr. Justice STRONG said, inter alia:

> "The statute 13 Eliz. is aimed only at intended fraud. . . . Other creditors may be delayed and hindered, but 'not in a fraudulent manner,' as was said by Tilghman, C. J., in Wilt v. Franklin, 1 Binn. 514."

In Wilt v. Franklin, 1 Binn. (Pa.) 502, 513, 515, the conveyance of a debtor's assets to a trustee for the purpose of putting his creditors on an equal footing was sustained against a judgment creditor. That creditor claimed that the transfer was fraudulent under the statute 13 Elizabeth. Mr. Chief Justice TILGHMAN said:

> "The statute of 13 Eliz. c. 5 (the provisions of which go no further than the common law as now understood) never had it in contemplation to invalidate a fair transaction. It was made to avoid fraudulent conveyances, intended for the purpose of defeating, hindering, or delaying creditors of their just debts . . . It may be objected, that this case comes within the words of the statute, because Wilt has been hindered, delayed, and in part defeated, by this deed. It is true he has been delayed and partly defeated, but not in a fraudulent manner. We must give the statute a reasonable construction."

These cases have been cited, followed, and their rulings have become the settled law in Pennsylvania.

> Lippincott v. Barker, 2 Binn. 174, 183, 184;
> M'Allister v. Marshall, 6 Binn. 338, 347;
> M'Clurg v. Lecky, 3 P. & W. 83, 91;
> The York County Bank v. Carter, 38 Pa. 446, 453;
> Bentz v. Rocky, 69 Pa. 71, 76, 77;
> Lake Shore Banking Co. v. Fuller, 110 Pa. 156, 162, 163.

The principle laid down in the Pennsylvania cases above cited was undoubtedly carried into Section 7 of the Uniform Fraudulent Conveyance Act because that section specifically provides that there must be an "actual intent, as distinguished from intent presumed at law, to hinder, delay or defraud".

It is respectfully submitted that in disposing of the instant case this Court has overlooked the clear construction which the Uniform Fraudulent Conveyance Act of the State of Pennsylvania and the statute of 13th Elizabeth have received by the highest court of the State of Pennsylvania, and above set forth, and has overlooked that such construction has established by the highest court of the State of Pennsylvania a rule of property, and that this Court should in the instant case accept and follow such construction.

In Sumner et al. v. Hicks et al., 2 Black 532, 533, 534, it was held that in cases involving the construction of a State statute relating to fraudulent conveyances this Court is bound to follow the judgment of the highest judicial authority of the State. Mr. Justice SWAYNE said:

> "The Statute of Wisconsin upon the subject of fraudulent conveyances is substantially the same with that of the 13th of Elizabeth, chapter 5, ... In cases like this, involving the construction of a State statute, this Court is governed by the judgment of the highest judicial authority of the State."

In Peters v. Bain, 133 U. S. 670, 686, involving the Virginia statute, Mr. Chief Justice FULLER said:

> "In controversies arising under this statute, involving, as they do, the rights of creditors locally, and a rule of property, we accept the conclusions of the highest judicial tribunal of the State as controlling.

Jaffray v. McGehee, 107 U. S. 361, 364; Lloyd v. Fulton, 91 U. S. 479, 485; Allen v. Massey, 17 Wall. 351."

See also:

South Branch Lumber Co. v. Ott, 142 U. S. 622, 627, 628;
Bamberger v. Schoolfield, 160 U. S. 149, 159.

(b)

THERE WAS NOTHING UNLAWFUL OR IMPROPER IN THE APPLICATION FOR THE APPOINTMENT OF RECEIVERS FOLLOWING THE FORMATION OF THE CORPORATION.

The receivership in this case is condemned by the Court for the stated reason that the Court was of the opinion that it was part and parcel of a scheme (of which scheme the formation of the corporation and the conveyance to it of the assets were the other elements) whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design to, as the Court says, "build up obstructions" that would hold his creditors at bay.

The formation of the corporation and the conveyance to the corporation could not have been in the mind of the Court as operating in any way to obstruct and delay creditors because it is clear that immediately upon the formation of the corporation it expressly assumed, as part of the consideration for the transfer to it of Robinson's assets, full liability for every one of the debts of the business. The debt of this petitioner was expressly assumed by name and amount, as were all of the other debts. Therefore, if this petitioner felt that the substitute for these assets which Robinson received, to wit, all of the stock of the corporation which had a clear value of $100,000., was too intangible to pursue, he was in no way jeopardized because he had as full and complete access to the tangible assets as he would

have had if they had remained in the name of Robinson individually. Certainly, in no way could the formation of the corporation and the transfer to it of the assets have removed the assets from the danger of levies and there could be no finding of fraud by reason of this part of the transaction, actual or implied. Apparently, therefore, the attitude of the Court arose from the fact that the application for the receivership followed so closely the formation of the corporation. The Court does not refer to the intervening occurrences which are set forth in the bill as making necessary some action by Robinson to conserve his assets.

There should be kept in mind constantly the admitted fact that at all times Robinson was amply solvent. We have, therefore, an individual possessed of ample property, but for some reason unable to meet a maturing obligation and demand of one of his creditors. This creditor, antagonistic, threatened suit. The debtor had one of two courses open to him; first, to remain quiescent, and, being wholly and admittedly solvent, wait until the action of such creditor had compelled or caused similar action by other creditors and thus changing his position to that of bankrupt; second, to take a fair procedure and endeavor to conserve his assets and preserve his solvency for the benefit first of his creditors and second, for himself. It seems hardly necessary to suggest to the Court that where a man is in a "frozen" condition his creditors would not stand idly by and allow one of their number to proceed to recover the full amount of his claim no matter at what cost or sacrifice.

To repeat, Robinson was amply solvent. He was conscious of the "frozen" condition of his assets and decided it was necessary or desirable to take steps to protect his assets against sacrifice and for the benefit of his creditors and himself because one or two of his creditors were antagonistic; for this reason he formed the corporation in order that if necessity arose, as a result of that antagonism,

or otherwise, resort could be had to the Federal courts for the purpose of providing for the conservation of his assets, and, if the event proved it necessary, for an equal distribution among his creditors under the most advantageous conditions. Such action was not an unworthy one. The language of Justice BLACK in Covanhoven v. Hart, 21 Pa. 495, 501, is very applicable. There, in sustaining a conveyance by a debtor in failing circumstances, Justice BLACK said:

> "We are not permitted to assign a bad motive to an act which is not wrong in itself or in its necessary consequences. . . . The act being right, no secret feeling can change its character. Indeed it may be said that the motive which results in proper action cannot be a bad one."

The object of any application to a court of equity for the appointment of receivers, and the effect of the appointment of receivers under such application, can be only, and can have no other effect than, to "hinder and delay creditors". Such result is undoubtedly an obstruction to creditors, but this obstruction is warranted and is authorized by the law under proper conditions. Wisely and properly used it can have no other than a beneficial effect. It is respectfully suggested that in order for any action in the instant case to amount to an "obstruction" worthy of condemnation there should appear a condition which would have improperly enabled the debtor to hold his creditors at bay through some control exercised by him, directly or indirectly, of his assets, and for some improper purpose. In placing the assets in the hands of the Court, and under its absolute control, this debtor was divested of all voice in the matter. It is true the action prevented the antagonistic creditor from enforcing his normal remedies, but such intent and such result is what justifies the exercise of the power of the Court to appoint receivers. The assets are surrendered by the debtor for the equal benefit of all cred-

itors. That benefit is obtained either by immediate liquidation of the assets and their distribution equally among the creditors, or, under the power and discretion vested in the Chancellor, the assets are conserved and managed. All of this, however, is absolutely beyond the control of the debtor and is solely and entirely in the hands of the Court. In the exercise of its discretion the court, is guided, if guided at all, solely by the wishes of the creditors, and not by the opposing wishes of the debtor if there is a conflict. Such action does not warrant the criticism contained in the opinion of Judge BOURQUIN in another case (59 F. (2d) 220), that "If the scheme be furthered by the cooperation of, say, an amiable court, what is it but employment of the judicial club to beat off and hold up creditors until, wearied, they settle with or wait the pleasure of the debtor's executive vice-president receiver shielded by the judicial gown?" We do not believe that this Court will take the position that there is an inclination among the District Court judges of this country to fail in the performance of their duty.

In furtherance of the contention made herein, the attention of the Court is respectfully called to the fact that if it had been in the mind of Robinson only to find a device whereby he could continue in business and hold off his creditors; to remove his assets from the danger of levy, or as the Court has said, to attempt "a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design", he could have accomplished everything that is condemned in the instant case by filing a voluntary petition in bankruptcy.

It is provided in USCA, tit. 11, Section 22, inter alia:

"(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this title as a voluntary bankrupt."

In Hargadine-McKittrick Dry Goods Co., 239 Fed. 155,

which was reversed in 244 Fed. 719, it was held that it is not essential that a petitioner for voluntary bankruptcy be insolvent. A certiorari to this Court was denied, 245 U. S. 667.

See also:

People's National Bank v. Foltz, 25 F. (2d) 295 (CCA 6th).

USCA, tit. 11, Section 11, provides, inter alia:

"The courts of bankruptcy . . . are invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, . . . to . . . (5) authorize the business of bankrupts to be conducted for limited periods by receivers, . . ., if necessary in the best interests of the estates, . . ."

The question of continuing the bankrupt's business through a receiver in bankruptcy is discretionary and the abuse of such discretion must plainly appear for the exercise of such discretion to amount to error.

In re Myley Electrical Supply Co., 287 Fed. 524 (CCA 2nd).

It is therefore respectfully suggested that the actions taken in this case were not worthy of condemnation. They were for the benefit of creditors rather than their detriment. Except for the fact of undoubted solvency, Robinson acted to his own detriment in proceeding in this manner. By receivership in equity he relieved himself of nothing, because neither he nor the corporation would be released from any of the existing indebtedness if sufficient funds were not realized to pay creditors. If it had been his intent to improperly use judicial process in order with

unfair motives to hinder or delay his creditors the obvious method would have been for him to file a petition in bankruptcy. If he had done this, "the business might go on and the importunate be held at bay"; he would have had the opportunity to try out any thought "that if suits can be staved off for a season he will weather a financial storm, and pay his debts in full", and with the ultimate result that if he found himself mistaken he would be relieved of further liability.

Nor should his action in forming the corporation under the laws of the State of Delaware be considered as having been done with an ulterior motive. If any wrongful motive was under consideration it would have been just as easy for him to form his corporation under the laws of the State of Pennsylvania and have non-resident creditors become parties to the Bill for the Receivership. As far as concerns the legal status of the action in connection with the jurisdiction, this would seem to be settled by the case of Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab Company, 276 U. S. 518, 524, 525. In that case there was an existing controversy between two corporations chartered under the laws of the same State. It was an established fact that the desire on the part of one of the parties was to have the controversy determined in a Federal court and for that purpose a new corporation was formed and the property of the first corporation transferred to it. Mr. Justice BUTLER in holding that there was nothing fraudulent in this under Section 37 of the Judicial Code said:

"The motives which induced the creation of respondent to become a successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In those

circumstances, courts will not inquire into motives when deciding concerning their jurisdiction."

If the respondent in the case above cited was warranted in bringing into existence a condition or status from which it gained the right to have recourse to a Federal court, when under its prior condition or status no such right existed, surely an individual who is solvent, but who sees in the distance danger to his financial structure, has the right to change his status in such manner that if the protection of his creditors and of himself should make it seem desirable, recourse to a court having fuller powers of administration might be had—particularly where there is no actual fraud involved.

(c)

THE RULING IN THIS CASE PRACTICALLY DESTROYS THE REMEDY OF CONSENT RECEIVERSHIPS IN EQUITY.

The Court has stated that there was no actual fraud in the instant case but that the actions taken were due to a mistaken idea of counsel and client as to the propriety of the procedure. Continuing to assume that the facts are as the Court found them, it is respectfully urged that the Court consider the necessity and desirability of reversing its finding.

If the facts in this case had disclosed an actual intent to defraud the creditors, or, to quote Judge BOURQUIN again, "to beat off and hold up creditors until . . . they settle with or wait the pleasure of" Robinson; if there were any facts that indicated an effort to deprive creditors of their honest dues and their right to resort to the assets, there could be no sound reason for differing from the conclusions reached by the Court. It is respectfully suggested, however, that it is of very considerable importance that the Court should draw a distinct and clear line between an

application for the appointment of a receiver, or steps taken to that end, pointing to an unfair or dishonest motive or result, of which there are unquestionably instances in the records, and one where there is every evidence of the highest good faith and not a scintilla of evidence to the contrary; one where the only result can be a benefit to creditors before any benefit can accrue to the author of the application.

There is a decided difference between an action intended to withdraw assets from those who are entitled to the benefit of them, and an action intended to prevent, and having the result of preventing, an antagonistic creditor from pursuing the ordinary remedies at law and thus causing a wreck of a solvent debtor. All of us undoubtedly have only too full knowledge that for several years past there have been tremendous numbers of individuals and corporations in a condition of solvency to a considerable degree if the intrinsic and fair value of their assets were considered, but who, because of money stringency, have not been able to promptly meet accruing indebtedness. Forced liquidations at any time, and certainly under the conditions that have existed in this country for several years back, inevitably result in disasters and losses in the business and commercial world. That wherever possible such disasters should be avoided goes without saying. That everywhere in this country effort has been made and is being made to save such disasters is common knowledge. For this purpose on countless occasions, resort has been had to receiverships under the control of a court of equity. This Court has said that receiverships in equity for the purpose of conservation have their place if their functions are properly exercised. It is thought safe to say that hundreds of receiverships are now pending and functioning under the control of the Federal courts in this country. It is with all seriousness and after much reflection that it is urged upon the Court that the ruling in the instant case, if per-

mitted to stand, will have the effect of destroying this commonly adopted method of attempting to conserve a solvent debtor's assets, and that the only recourse to a debtor who is embarrassed from lack of ready funds, and who is threatened by an antagonistic creditor, and whether he is solvent or insolvent, will be bankruptcy.

A consent receivership cannot be had unless there is an agreement between the debtor and his creditors that the proceeding be instituted. The appointment of receivers may be to conserve the assets and save them from sacrifice, but its unavoidable effect, and its undoubted intent in its conception, is to delay creditors who are antagonistic and insist on sacrifice of assets by forced liquidation. Any such receivership would, therefore, be subject to attack by any dissenting creditor on the ground that the proceedings were instituted for the purpose of hindering and delaying creditors, and, therefore, was fraudulent in law, notwithstanding the highest good faith had been exercised by the debtor and the creditors participating therein. If the receivership was asked for on behalf of a corporation, the proximity in point of time between the granting of the charter and the application for the receivership would not be a controlling factor in the case, because if the fact that the purpose of the proceedings is the "hindrance and delay of creditors" is fatal to the action it would make no difference whether the corporation was three days old or three years old.

A necessary consequence, therefore, is that no consent receivership could be safely asked for without an agreement in advance between the debtor and every one of his creditors. A necessary element of the application for the appointment is that loss is threatened by reason of the action of some creditors and the very fact of an agreement by all of the creditors would thus remove a jurisdictional element.

By the ruling in the instant case, the wishes of the entire body of creditors may be defeated by one antagonistic creditor—if a debtor was solvent a hundred times over

but handicapped by "frozen assets", with the balance of his creditors willing to join in the saving of the situation, the one antagonistic creditor could force the debtor to inactivity until the antagonistic creditor had pursued the debtor so far that the only recourse would be bankruptcy.

It may be said that the effect of the ruling herein will be to render dangerous the participation of creditors in a bankruptcy proceeding. If the opinion is pursued to its logical end the ruling herein would give a dissenting creditor in a bankruptcy proceeding the right to be exempt from the effect of the bankruptcy on the charge that the bankrupt had resorted to the bankruptcy proceedings not in good faith but as "part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design"—this whether it was a voluntary petition by a solvent debtor or whether it was an involuntary petition by creditors. The Court has held that the plaintiff McLean was a party to Robinson's actions although it does not point out whether it means that McLean's activity began before the filing of the bill for a receiver. The same conclusions could be drawn as to a petition in bankruptcy as have been drawn in connection with this transaction.

We have the well established principle that persons participating in an application for a receivership with actual fraudulent intent incur liability. Whether that principle might be extended to cover a case where there was legal fraud only is a matter of doubt, but the possibility of being involved in litigation concerning such a question is presented to any creditor who joins. It is suggested to the Court with all respect that it has paid more attention to the form than to the substance of this transaction. The result of the position taken by the Court is that if two men were carrying on identical businesses, one in corporate form and the other as an individual, although the ownership of each in his respective business was complete and entire, the first could avail himself of the opportunity to do what

Robinson has done here without criticism even though the intent and effect of his action would be exactly the intent and effect of the action of Robinson; the only difference being that one had gone through the formality of obtaining a charter from some State and the other had failed so to do.

If the foregoing analysis of the effect of the opinion in this case is correct, a man accepting the appointment as a receiver would act at his own peril in the event that it was shown, as it can be shown in any consent receivership, that the receivership was conceived for the purpose of delaying the enforcement by creditors of their claims so that the assets of a frozen but admittedly solvent debtor may be conserved and saved from sacrifice. The necessary consequence of this is that it would have to be ascertained whether all the creditors were satisfied because if there were a number of non-assenting ones the peril under which such receiver would act would deter men of ability and responsibility from accepting the appointment.

We are all aware that abuses have crept into the administration of equity receiverships. We are aware that in some instances these abuses have been great. It is suggested, however, that in comparison to the great total of equity receiverships, such abuses make up a very small proportion. It is ventured to say that the great proportion of them are administered honestly and properly under the supervision by the courts in the performance of their duty; that the result is one which should be encouraged rather than discouraged. Wherever corrective steps can be taken they should, of course, be taken. The power to conserve and manage the assets of a solvent debtor so that they shall not be depreciated unnecessarily in value is one of great importance, not only to the debtor and to his creditors but to the communities at large, and it is most earnestly urged that because in some cases unfair or unworthy motives or actions are present or are pursued no reason for abandoning the whole system is presented. Without

intending to be in the least impertinent, we venture to commend to the attention of this Court the statement of Judge PARKER of the Untied States Court of Appeals for the Fourth Circuit, "There is no sense in burning down your house to get rid of the rats".

It is therefore most respectfully submitted that for the reasons in law given above, and as a matter of sound and vital public policy, the ruling made in the instant case should be withdrawn, a rehearing granted, and the decree of the Circuit Court of Appeals affirmed.

Respectfully submitted,

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